IN THE

SUPREME COURT

OF THE

UNITED STATES.

The San Jose Land and Water Company,

Plaintiff in Error,

vs.

The San Jose Ranch Company.

APPELLANT'S OPENING BRIEF.

This is an action brought by the plaintiff under Section 738 of the Code of Civil Procedure of the state of California to quiet title or determine the adverse claims of defendant to the east half of the north west quarter of section 25, township 1, north, range 9 west, S. B. M., a tract of land which was sold by the Southern Pacific Railroad Company by contract dated February 28, 1887, to plaintiff's predecessors, Noland and Heckenlively, as part of such Railroad Company's lands under a grant to it by the Act of Congress of March 3, 1871. The tract of land is situate within the conflicting limits of the Atlantic and Pacific Rail-

road grant and said grant to the Southern Pacific Railroad Company.

The answer denies the title of plaintiff, and sets up by special defense the right to maintain certain dams and ditches and pipe lines over and across said property, alleging that such rights were acquired in 1870 and continued down to the commencement of the action, by which the waters of the San Dimas Creek were diverted by defendants across said lands.

In support of this allegation of ownership, appellant relied upon its rights to purchase said tract of land from the government as a *bona fide* purchaser under a *bona fide* contract from the Railroad Company derived from the 5th Section of the Act of Congress, approved March 3, 1887, relating to the adjustment of railroad grants. The facts showing that appellant's predecessors were *bona fide* purchasers in good faith from the Southern Pacific Railrord Company are fully found by the lower court. [See Findings X and XI, folio 23 17.]

The date of the purchase by defendant's predecessors from the Southern Pacific Railroad Company was February 28, 1887; and the court found that shortly after such purchase the said Heckenlively did, under said agreement of purchase, enter upon said land and commence the construction of a ditch and tunnel thereon. [See Finding XI.]

The court also found that in July and August, 1887, the defendant entered upon said described tract of land and built and constructed thereon a stone, brick, and cement forebay or dam, and laid and constructed across said land from said forebay a 14-inch pipe; and that the defendants now claim the right to maintain on said lands said 14-inch pipe and said forebay or dam.

It will be noted that the construction of this dam or forebay and pipe and the entry on said land for

such purposes was after the passage of the Act of Congress of March 3, 1887, under which appellant bases its right.

The court also found that in 1883, one, Stowell, a predecessor of the defendant, constructed across a portion of said lands a 12 inch pipe line for the purpose of conducting water claimed by him in the San Dimas Creek from its point of diversion, which point of diversion (which point of diversion was not upon said described land) across said land to the S. E. ¼ of said Section 25, Township 1, north, range 9 west, S. B. M., and to other lands.

And it further finds that in the month of July, 1887, the defendant had succeeded to and owned the water right owned or claimed by Stowell and all the interest of said Stowell in the said 12-inch pipe.

The evidence shows that when the defendant entered upon said land in July or August, 1887, and commenced the construction of the forebay or dam thereon, the said Heckenlively, plaintiff's predecessor, saw the work being done and forbade the defendant from going on with the work; that the defendant's workmen thereupon left, and Heckenlively put a notice on a tree nearby forbidding them to go ahead with the work or to trespass upon the land; that when Heckenlively went back he found them at work again, and the workmen told him they were told to go ahead, and that Heckenlively said to the workmen that "we would have trouble about it."

From the foregoing statement of facts found or proven, the chief question presented is this: Has the *bona fide* purchaser of forfeited railroad grant lands such title or interest in the lands under the Act of March 3, 1887, that he can before applying to purchase the land, maintain an action to protect his rights to the land as against a trespasser upon the land? For such we will show was the attitude of the

defendant when it constructed the dam or forebay in August, 1887.

This action while it has been termed an action to quiet title is really an action under Section 738 C. C. P., which is as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The section embraces both equitable causes and legal actions, the suit being deemed in the nature of a law action, so that either party is entitled to a jury trial if the defendant is in possession [see 88 Cal. 127; 98 Cal. 420]; and being deemed a cause in equity if the plaintiff is in possession, the form of the complaint being the same in either case. Under said section, the holder of any kind of interest in real property, whether equitable or legal, can maintain an action to determine the claims of others adverse to him, and this whether in or out of possession, the only limitation being that the holder of an equitable title may not maintain the action against the holder of the legal title.

In Pennie v. Hildreth, 81 Cal. 130, the Supreme Court of this State said: "The language of the Code, Section 738, C. C. P., is broad enough to cover every interest or estate in lands of which the law takes cognizance."

See also, Pierce v. Felter, 53 Cal. page 18, where the same strong language is used.

See also, Tuffree v. Polhemus, 108 Cal. 667.

That the Act of March 3, 1887, confers some right or interest in the land upon the bona fide purchaser thereof in good faith for value from the Railroad Company, we think can admit of no doubt. The interest accrued is undoubtedly an equitable interest, which, upon the performance of certain conditions, will ripen

into the legal title. That it is treated as an interest in the land by the decisions of the land office and an interest which may be enforced and protected, is abundantly shown by the authorities. There have been a large number of cases before the land department involving the rights of bona fide purchasers or successors in interest of bona fide purchasers under the 5th Section of the Act of 1887, and we make the following quotation from the syllabi of some of said cases:

"The right of a qualified transferee to purchase under Section 5 is not affected by the fact that his purchase was made after passage of said act, if the land was originally purchased in good faith. L. D. XXVII, 307, VV. 227, XXI. 557.

"Corporations may purchase. L. D. XIX. 141, XXII. 587.

"Any bona fide purchaser, or one to whom the bona fide purchaser has transferred the land, may perfect title under Section 5 when the claim of the corporation fails. XIV. L. D., XIV. 237.

"In 23 L. D. 508. The applicant was Executrix of purchaser from R. R. Co.

"The applicant to purchase makes a prima facie showing that the land was sold by the company to her immediate grantor, that the sale was made in good faith, and that at date of sale the land was not in the occupancy of an adverse claimant under any of the land laws. L. D. XIII. p. 183.

"1. A settlement claim acquired after passage of the Act of March, 1887, and subsequent to the sale of the land by the railroad company, will not defeat the right of the purchaser, or his transferee, to perfect title under the provisions of Section 5 of said act.

"2. A purchaser of the standing pine timber on land excepted from a railroad grant, is entitled to protect the interest thus acquired in the land under

the provision of said section, if the timber constitutes the chief value of the freehold.

"3. A transferee claiming the right to perfect title under the terms of said section, must show that the purchase from the corporation was made in good faith.

"4. The right of a *bona fide* purchaser to perfect title under said section is not affected by the fact that his was made after the passage of said act, if the original purchase was made in good faith.

"Holton v. Rutledge, XX L. D. 227.

"The right of one who purchased land from a Railroad Company prior to the passage of the act of March 3, 1887, to perfect title under the 5th section of said act, is superior to the settlement right of another acquired after the passage of said act.

"Skinbek v. Longster, L. D. XXII. 32.

"Same case shows that all the claimant of benefit of said section has to show is the purchase in good faith for a valuable consideration, and that he is a citizen.

"See also the same effect Yocum v. Keystone Lumber Co., XXII. L. D., 558. The purchase in this case was by a lumber company, the applicant was a transferee.

"Settlement on land withdrawn for the benefit of a railroad company, in violation of an order expressly prohibiting such settlement until the formal offering of said land thereto, confers no right that can be asserted as against the right to purchase under the provisions of section 5.

"A *bona fide* purchaser from a railroad or one taking under such purchaser who has sold and transferred the land, may perfect title under Sec. 5 of said act, when the claim of the company fails. Union Pacific R. R. Co. v. McKinley, et al., L. D. XIV. 237.

"The *bona fide* purchase from the R. R. Company, and the 5th section of the act of 1887, and the con-

tinued withdrawal for purchaser's benefit places the land purchased by said bona fide purchaser in precisely the same position as the land of the homstead settler who has made entry in the land department and done nothing more. Such being the case, McGuire v. Brown, 106 Cal. page 660, is directly in point. In that case it is decided:

"'The Act of Congress confirming vested and accrued rights to the use of water for beneficial purposes, acquired by priority of possession thereof on the public lands, as against homestead settlers on those lands, does not justify a ditch-owner in shifting the point of diversion and the line of his ditch without the consent of a homestead settler on riparian lands, who has obtained a certificate of entry of such lands.

"'The terms of the proviso found in section 9 of the Act of Congress of July, 1866, that whenever any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party permitting such injury or damage shall be liable to the party injured therefor, does not authorize the construction of a new ditch or canal nor grant rights of way where none existed before, nor confer additional rights upon owners of ditches subsequently constructed.

"'The right of a homestead settler who has made entry but has not made final proof of residence and cultivation, or obtained a patent, amounts to an equitable interest in the land subject to the future performance of certain conditions, and, until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government.

"'The former decisions of this court, to the extent to which they hold that the interests of a settler on the public lands under the pre-emption or homestead laws attaches as against the proprietor of water rights on his tract only as of the time of his final proof or of obtaining a patent, must

be controlled by the decision of the Federal Supreme Court to the contrary.' "

On page 665 the court says:

" 'Has the prior appropriator license to enter upon the homestead claim of such a settler for the purpose of materially changing thereon the point of diversion and constructing new water ways through the land? Is such a license among the servitudes to which the land must be submitted?

" 'We think not. 'In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property.' [Witherspoon v. Duncan, 4 Wall. 218.] The term entry as applied to appropriations of lands within the scope of the language just quoted, has been held to mean 'that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim.' [Sturr v. Beck, 133 U. S. 54749, citing Chotards v. Pope, 12 Wheat. 588; Hastings &c. R. R. Co. v. Whitney, 132 U. S. 357.]' "

In our case the "inceptive right" was acquired under said 5th section, by the *bona fide* purchase of a tract of land within the limits of a land granted to a railroad company and withdrawn for its benefit from "location, sale, or disposal."

On page 669, Vol. 106, Cal., the court says:

" 'In Sturr v. Beck, 133 U. S. 547-549, the court quotes with approval this language of Attorney-General MacVeagh in an opinion rendered by him in 1881: 'Upon the entry, the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part, to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land subject to the future perform-

ance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership); and, until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government.'"

Just so is the right of the bona fide purchaser from the railroad company "an equitable interest in the land subject to the future performance by" the bona fide purchaser "of certain conditions, (in the event of which he becomes invested with full and complete ownership)" and so "until forfeited by a failure to perform the conditions, by the *bona fide* purchaser his equitable interest must prevail not only against individuals but against the government."

The condition that the bona fide purchaser has to perform, is simply, when by the rules and regulations of the land department he is permitted to do so, to apply within a reasonable time and pay the government price and get his patent.

This "equitable" ownership necessarily attached to the whole land and all its incidents and all fixtures that have been incorporated with the land and becomes a part thereof.

Just as in this California case just cited, the homestead settler had a right to fill up and destroy the ditch put upon the land, by the prior appropriator of the water, after his "entry" of the land, because it was his ditch and not the appropriators who had wrongfully put it there.

The effect of a withdrawal of the lands from settlement by virtue of a grant to the Railroad Company is well settled. See the following authorities:

In St. Paul and Pacific Railroad Company v. Northern Pacific R. R. Co., United States Supreme Court, book 35 of the Lawyers' Co-operative Co., on page

84, S. C. 139 U. S. p. 1, Judge Field, in delivering the opinion of the court in speaking of withdrawal of lands for the benefit of railroad companies, says: "After such withdrawal, no interest in the lands granted can be acquired against the rights of the company." And on the same page, he says: "The object of the withdrawal was to preserve the land unincumbered until the completion and acceptance of the road."

The right to acquire any kind of interest in the United States public domain, whether it be a right to settle upon, to appropriate water upon it, or to construct or maintain a ditch upon it, or to divert water upon it, is confined to such portion of such domain as is legally known as "public land."

In Barden v. the Northern Pacific Railroad Company, 145 U. S. p. 535, [S. C. L. C. Co., U. S. Reports, book 36, p. 806], it is decided that "by public lands is meant such land as is open to sale or other disposition under the general laws. Land to which any claims or rights of others attached, does not fall within the designation of public lands."

Field, in deciding the point just quoted, on page 811, book U. S. R. L. C. Co., says that he at one time dissented from the doctrine, but that the Supreme Court had uniformly held otherwise, and that he himself had come to the conclusion that it was right, and that "it is better and safer, both to the government and private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open the field of litigation between the grantee and third persons." The whole decision is instructive upon the point, as it reviews the authorities.

In Mann v. Tacoma Land Co., 153 U. S., p. 274 [S. C. L. C. Co., U. S. R., book 38, p. 719], it is decided that:

"The term 'public lands' in a statute authorizing location of scrip, does not include 'tide lands.' The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In Butte v. Northern Pacific Railroad Co., book 30, L. C. Co., U. S. R., on page 336, Judge Field delivered the opinion, and in speaking of railroad grants, says:

> "Where the general route of the road is fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

In Sager v. Swenson, 64 Minn. 517, S. C., 67 N. W. R., page 544, it is decided that:

> "Lands within the 'place' or indemnity limits of a land grant railway company are not subject to entry and settlement, and no lawful settlement thereon can be acquired during the continuance in force of an executive withdrawal of such lands from entry and settlement, although the road has no vested right in such withdrawal."

We quote these additional authorities:

Wolcott v. Des Moines Imp. Co., 5 Wall. 681;
Williams v. Baker, 17 Wall. 144, 153;
United States v. Des Moines Imp. Co., 142 U. S. 110, 546;
Riley v. Wells, 154 U. S. 578;
Wood v. Beach, U. S. 150;
Northern Pacific R. Co. v. Musser-Sanitary Co., 168 U. S., pp. 608, 611.

It would seem clear from the foregoing authorities that an interest in the land was acquired by Heckenlively and Noland and by them transferred to the plaintiff by virtue of the bona fide purchase of Heckenlively and Noland from the Railroad Company, and under the Act of March 3, 1887, it would seem to follow irresistibly from such fact that the plaintiff would have a right under the California Statutes, Section 738, C. C. P., to have its right or interest in the land quieted as against the adverse claims of the defendant in so far as the defendant was seeking to assert the right to maintain the structure placed upon said land by it in July and August, 1887, after the purchase by Heckenlively and Noland.

The Supreme Court of this State based its opinion in this cause upon two assumed principles—

First. That inasmuch as no actual occupancy of the land had been taken by appellant's predecessors, and no application for patent had been filed by appellant, and there was no evidence given of the intent to make such application, the facts did not show such interest in the land in appellant as would support this action. In other words, that a bona fide purchaser under the Act of March 3, 1887, who was not in possession and who has not exercised his right of purchase or expressed his intention to exercise such option, has no ownership in the land such as could be quieted against one who, prior to the Act of 1887, acquired some interest therein;

Second. That a court of equity would not lend its aid to quiet plaintiff's title where the right to purchase accrued in 1887, and the plaintiff up to the time of the decision in 1897 had failed to exercise its right to purchase by making application to the land office to purchase the land under the Act of March 3, 1887.

The opinion in both phases is based upon false predi-

cates. In the first place, the opinion discusses the case entirely upon the theory that the respondent acquired the right to maintain a 12-inch pipe line upon the land prior to 1887, and that such right became vested when the lands were restored to public ownership in 1886, and that such rights were superior to the rights of the bona fide purchaser from the Railroad Company under the act of March 3, 1887.

In discussing plaintiff's rights to maintain the action as against the defendant, the court entirely omits any consideration, so far as the reasoning of the opinion indicates, of the fact found by the lower court that defendant in August, 1887, constructed the forebay or dam and the 14-inch pipe connected therewith upon this land of appellants, which said acts constituted a new and distinct trespass and assertion of a new and distinct right different from and in addition to the right originally acquired to maintain a 12-inch pipe across the land, and defendant is now asserting the right to maintain this forebay or dam and 14-inch pipe.

One who has acquired a right to maintain a pipe line over public lands, cannot, after the rights of others have intervened in the land, acquire any new rights on the land different from those already acquired by virtue of his old easement.

See

McGuire v. Brown, 106 Cal. 670;

Sturr v. Beck, 97 U. S. 576, quoted from above.

If it should be contended that the forebay or dam and 14-inch pipe were merely a change in the form and mode of use of the original easement to maintain a 12-inch pipe, then the case is controlled by Lyman Allen v. San Jose Land & Water Company, 92 Cal. 138, where it is held that one who has an easement for a ditch cannot change it to a 12-inch pipe

line, and by parity of reason, a 12-inch pipe across the land cannot be changed to a 14-inch pipe connected with a forebay or dam constructed upon the land.

As stated above, this phase of the case, to-wit, this new and distinct trespass is not discussed by the learned commissioners who decided the cause, and that part of the opinion bearing upon the right of plaintiff to the relief sought as against the claims of defendants treats these claims as rights acquired prior to 1886, which became vested when the lands were restored to public ownership in 1886. The court in this connection says:

> "While the land was withdrawn from entry under its grant, it did not object to defendant's appropriation, and before any rights were acquired by plaintiff's predecessors the land was restored to the public domain, and whatever rights defendant's predecessors had acquired by appropriation of water or rights to make ditches and lay pipe lines attached at once upon the forfeiture of the grant of the Atlantic and Pacific Company by the act of 1886 and the restoration of the land to the public domain. If the land had not been granted to the Atlantic and Pacific Company the rights of the appropriators would have attached to the land under the act of July 26, 1866, and amendatory acts, granting the right to construct ditches, etc., and we see no reason why, upon the failure of the grant and the resumption of full title by the government, that defendant's rights did not become valid from their inception. It results that whatever rights defendant acquired were undisturbed by the grant to any of these roads, and but for the act of Congress, next to be noticed, these rights of defendant are indisputable. On March 3, 1887, Congress passed an act entitled 'An Act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes.'

(24 U. S. Stats., p. 556.) The main purpose of this act was to relieve purchasers of forfeited lands. Section 2 provided for canceling patents erroneously issued to any company. Section 3 related to bona fide settlers under the pre-emption or homestead laws and reinstated them in their rights if their application was renewed within a reasonable time. Section 4 gave the right to a purchaser in good faith from the railroad company to a patent from the government, upon making proof of such purchase within such time as might be prescribed by the secretary of the interior. The case before us does not come within the provisions of any of these sections.

"Appellant claims under section 5, which reads as follows: 'That where any company shall have sold to citizens of the United States * * * * as parts of its grant, lands not conveyed to or for the use of such company, * * * and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns.' Provisos in the section except therefrom lands 'in the bona fide occupation of adverse claimants under the pre-emption or homestead laws,' etc., and also 'lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States,' etc. [24 U. S. Stats., p. 556. 129 Cal., pp. 678-679.]"

It may be contended that the second proposition involved in the opinion, to-wit, laches in exercising the right to purchase, would or should control the decision, even as against trespasses or acts committed in August, 1887, after the purchase of plaintiff; but an answer to that is that the second proposition is based upon an entire misconception of the facts and the law. While

the opinion concedes that a bona fide purchaser coming within the 5th section of the Act of March 3, 1887, would, under certain conditions, be entitled to have his interest and title derived under that section quieted, it holds that what it finds to be laches on the part of appellant deprives appellant of that right in the eyes of a court of equity.

The court says:

> "In the case before us, there is no evidence that plaintiff or its predecessors are now or ever were in posssion of the land; there is a finding that Heckenlively, shortly after he entered into the contract with the Southern Pacific Railroad Company, 'did enter upon said land, and commence the construction of a ditch and tunnel thereon,' but there is no evidence as to what part of the land this was or as to the extent of this temporary possession, or how long he remained or what work he did; there is no evidence that plaintiff or any of its predecessors ever applied to purchase the land, or expressed an intention to do so, or that plaintiff now desires to purchase or intends to purchase the land. Its right to purchase accrued, if at all, in 1887. It seems to me conceding that it has not lost this right by its delay to make application to purchase that a court of equity ought not to grant the relief asked upon a mere right to purchase, such as is shown in this case, where it appears that plaintiff and no person under whom it claims was ever in possession of the land; is not now in possession; has never applied to purchase the land, and does not show any intention to purchase it. We think there should be some more tangible right shown than appears here before a court of equity will lend its aid to quiet plaintiff's right, which appears to be nothing more than an option to purchase unaccompanied by any equitable circumstances."
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> [San Jose Land & Water Co. v. San Jose Ranch Co., 129 Cal., p. 680.]

That appellant should not be held responsible for such supposed laches, will appear from a simple statement of facts of which this court takes judicial cognizance. Until the decision of the United States Supreme Court rendered on the 12th of December, 1892, in the case of the United States v. the Southern Pacific Railroad Company, 146 U. S. R., page 570, it was universally supposed both by the United States Land Department and by the courts in California, United States Federal Courts, and also by the general public that the lands lying in what is now known as the conflicting limits of the A. & P. Co., and the S. P. Co. under its grant of 1871. It therefore must follow, and the fact is, that when this suit was tried in 1890, it was tried by counsel and by the court below on the supposition that the railroad contract was for a tract of land which it had the right to sell, and that appellant's right was based upon the right derived under that contract, and that appellant was in no fault for not making application to purchase prior to December 12, 1892, even if he could have done so.

The court will also take judicial notice of the fact that the land was withdrawn from "sale, location, or pre-emption or homestead" for the benefit of the Southern Pacific Railroad Company—under its grant of 1871—by order of the commissioner of the Land Department, dated April 2, 1871. And that it was not restored to the public domain again until 1898, by letter of the Secretary of the Interior, dated January 18 and 28th, 1898, and that in fact, as shown by the public records of the Land Office in Los Angeles, California, no application to purchase any of said land could be entertained till September, 1898. So it is evident that appellant could be guilty of no laches for not making application to purchase before September, 1898. We will add that as soon as it could do so, ap-

pellant's successors in interest made its application and now has its patent.

The details of the withdrawal for the benefit of the Southern Pacific Company in 1871, are fully stated in said 146 U. S. 570, at pages 601 and 602, and the details of the restoration are fully shown by letter of the United States Land Commissioner to the register and receiver at Los Angeles, dated April 15, 1898.

Another false premise upon which this opinion of the learned commissioner is based is that Heckenlively never entered into possession of the property; and we will add that in our opinion, it is an equally false premise to assume that possession is in any respects essential to the rights of the *bona fide* purchaser under the Act of 1887, in order to entitle him to protect those rights as rights granted by the 5th section of the Act of March 3, 1887. We know of no rule or principle of law which warrants the court in adding a condition which is not prescribed by the statute. In fact, however, the evidence shows and the court finds that Heckenlively, shortly after the purchase by him, entered upon the land and commenced the construction of a ditch and dam thereon, and the evidence shows that he was upon the ground when the defendants were constructing their dam, and twice forbade them proceeding with the work.

Another element which is injected by the learned commissioner as a condition of the assertion by the appellant of its rights is that if it has not made application to purchase, and there was no evidence of an intention to do so. We know of no more forcible expression or evidence of the intention on the part of appellant to assert its claims under the Act of 1887, the only title or claim of title it has, than the continuous prosecution of this action. It is true the suit was originally begun and tried on the assumption that the

railroad grant was valid, and on the theory on the part of plaintiff that the railroad contract conferred the right of possession and an equity title upon it to said land; but after submission of the cause and after the decision of the Supreme Court finally adjudicating that the Southern Pacific Railroad Company had no title under said grant, evidence was introduced showing that Heckenlively and Noland were *bona fide* purchasers from the railroad company, and the lower court found all the facts which would be necessary to prove before the Land Office in order to entitle the appellant to a patent for the land; and we reiterate that the prosecution of this action by the appellant, basing all of its rights to relief under the Act of March 3, 1887, was far more potent evidence of the intention on the part of appellant to exercise its rights than any mere assertion of such intention would be.

Under the circumstances shown by this case where, at the time of the commencement of the action and for more than a year after the case was decided, this land, through action of the Land Department, was withdrawn from entry and no application could be made by the appellant to purchase the same, for this court to hold that no action could be maintained by the purchaser to protect his rights to that property as against trespassers, would establish so harsh a rule that its application in other cases, just as in this, would result in loss of the land or in easements being acquired thereon by adverse parties or users. Under our law, continuous adverse possession for five years bars action and confers title upon the adverse user, and if, as here, the right to apply for patent was withheld for over five years, and the land should be in the adverse possession of some third party, the purchaser from the railroad company would be forced to sit idly by and see such possession ripen into absolute title, he being

powerless under the harsh rule sought to be established by the opinion of the Supreme Court in this case.

We respectfully submit that no rule allowing such injustice or outrage upon a man's right will ever be sanctioned by this court.

W. H. Anderson
Atty for Plff
in Error.